U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

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Date: 08/12/99
Case No.: **1999 INA 049**

In the Matter of:

KILLOTON, INC., Employer,

on behalf of

YOON-SOO UEO, Alien

Appearance: T. J. Stefanski, Esq., of Los Angeles, California, for Employer and Alien
Certifying Officer: R. M. Day, Region IX.

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application filed on behalf of YOON-SOO UEO ("Alien") by KILLOTON, INC., ("Employer") under§ 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On April 25, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Purchasing Agent" in its "Garment Manufacture/Wholesale (Women's Apparel)" business.[2] See AF 17, Schedule K, line 5. Employer described the Job to be Performed as follows:

> Confer with distributors to obtain product information such as price, availability, and delievery schedule. Calculate price of products according to knowledge of market price and selet products for purchase. Prepare purchase orders and/or bid requests. Negotiate contracts with distributors. Discuss defective materials with the vendors to discover the source of trouble and to correct these matters through reimbursement for damaged products.

AF 45, box 13. (Copied verbatim without change or correction.) The Job Offered was classified as "Purchasing Agent" under DOT Occupational Code No. 162.157-038.[3] The educational requirements were completion of high school plus two years of experience in either the Job Offered or the related Occupation of "Management of wholesale & Manufacturer of women's clothing company." The Other Special Requirement was "Must speak, read , and write Korean

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[2] A National of Korea, the Alien was born 1962. His employment and training after earning a baccalaureate degree in Marketing in May 1987 to May 1990 was not disclosed in his Statement of Qualifications. From May 1990 to the date of application, he has been the owner and the "President/Manager" of a business engaged in "Manufacture & Wholesale of women's garments." On the date of application, the Alien was residing and working in the United States under an E-2 visa. AF 15. An E-2 visa is issued to admit a foreign national as a "nonimigrant investor," who has made a substantial, active investment in and owns at least fifty percent of a business in the United States, and who intends to depart from the United States upon the termination of E-2 status. 22 CFR § 41.51. The representations for the Alien's E-2 visa status appear to be incompatible with those in the application before the Panel.

[3] 162.157-038 **PURCHASING AGENT** (profess. kin.) alternate titles: buyer. Coordinates activities involved with procuring goods and services, such as raw materials, equipment, tools, parts, supplies, and advertising, for establishment: Reviews requisitions. Confers with vendors to obtain product or service information such as price, availability, and delivery schedule. Selects products for purchase by testing, observing, or examining items. Estimates values according to knowledge of market price. Determines method of procurement, such as direct purchase or bid. Prepares purchase orders or bid requests. Reviews bid proposals and negotiates contracts within budgetary limitations and scope of authority. Maintains manual or computerized procurement records, such as items or services purchased, costs, delivery, product quality or performance, and inventories. Discusses defective or unacceptable goods or services with inspection or quality control personnel, users, vendors, and others to determine source of trouble and take corrective action. May approve invoices for payment. May expedite delivery of goods to users. *GOE: 11.05.04 STRENGTH: L GED: R4 M3 L4 SVP: 7 DLU: 87*

& English. Language Breakdown Korean 60% English 40%." *Id.*, boxes 14-15. The monthly salary offered was $2,250 with overtime beyond a forty hour week as needed at an hourly rate equal to time and a half. The workday hours were from 8:30 A.M. to 5:30 P.M. AF 45, boxes 10-12, 14, 15.

Notice of Findings.[4] Subject to rebuttal, the CO denied certification on March 18, 1997, concluding that the Employer failed to document the existence of a job that was truly open to U. S. workers, citing 20 CFR §§ 656.3 and 656.20(c)(8).

The NOF found incongruity in the Application's premise that the Alien, who is the president, manager, and owner of Eden, Inc., ("Eden"), in which his capital investment is active and substantial, is seeking a full-time job as Purchasing Agent in Killoton, Inc. ("Killoton"). The NOF added that the Job Offered is a newly created position, and the President of the Employer is Sung-Kook Kim ("Kim"), who since 1994 had been employed by Lira Fashions, Inc., ("Lira"). Kim was sponsored by Lira for alien labor certification and became an employee of Lira some months before this Application was filed by Killoton. "[T]hus," said the NOF, "while Mr. Sung Kook Kim works for Lira, it is not clear how [he] would truly be supervising the alien Killoton, Inc., as indicated on the ETA 750A form, if the alien truly went there from Eden, the company that he owns to work for the petitioner." Based on these circumstances, the NOF said, it appeared that the Job Offered was being created for the Alien, and there was no job for a U. S. worker within the meaning of 20 CFR §§ 656.3 and 656.20(c)(8). The NOF then directed Killoton to vitiate the suspect aspects of this Application by clarifying the relationships discussed in the NOF. AF 41-43.

Rebuttal. On April 18, 1997, counsel for Killoton filed a rebuttal that consisted of a letter by Employer's president, the articles of incorporation and by-laws Killoton adopted during 1990, a letter from the Alien, articles of the incorporation of Eden during 1990, by-laws that Eden adopted in July 1996, the minutes of a meeting of the Eden Board of Directors, and a letter from Lira verifying that Kim was its employee from September 1994 to December 1995. In September 1994, a few years after he started Killoton, Kim said his wife took over its operation, and he took a job with Lira, remaining there until December 1995, and returning to the Killoton payroll in January 1996, long after this Application was filed. Kim said he was the owner and president of Killoton through the entire period of his employment by Lira. Kim denied that he or his wife was related to the owners of Eden or held any position with the firm. AF 13. The Alien said he owned and operated Eden from May 1989 to August 1994. In June 1993, the Alien's statement continued, Eden established a new firm that engaged in business as a wholesale distributor of diamond blade saws under the name of "Shark Diamond" ("Shark"), and was still in operation at the time the rebuttal was filed. Although he intended to turn the operation of Shark over to his wife, the Alien said he planned to continue as president of Eden dba Shark while he was working for Killoton. AF 21.

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[4] **20 CFR § 656.25(c)** If a labor certification is not granted, the Certifying Officer shall issue to the employer, with a copy to the alien, a *Notice of Findings*, as defined in §656.50. The *Notice of Findings* shall: (1) Contain the date on which the *Notice of Findings* was issued; (2) State the specific bases on which the decision to issue the *Notice of Findings* was made; (3) Specify a date, 35 calendar days from the date of the *Notice of Findings*, by which documentary evidence and/or written argument may be submitted to cure the defects or to otherwise rebut the bases of the determination, and advise that if the rebuttal evidence and/ or argument have not been mailed by certified mail by the date specified.

Final Determination. The CO denied certification in the Final Determination, dated July 23, 1997. AF 07-10. After reciting the background discussed in the NOF, the CO pointed out that the Job Offered apparently was newly created, that the Alien's company, Shark, was paying him significantly more in salary than Killoton offered him to work as its purchasing Agent, and that the Alien's wife would run Shark when the Alien was hired by the Employer. The CO said the NOF directed the Employer to show who had been managing Killoton since 1994, while Kim was working for Lira, which had hired him pursuant to a grant of alien labor certification. Employer also was directed to document the work of the Alien's wife prior to the filing for certification for the purpose of "showing how it is credible that she would immediately replace the alien while the alien took a subordinate position as a purchasing agent for this petitioning employer."

The CO then described Employer's rebuttal filing and concluded that the rebuttal was not persuasive. After observing the coincidence that the same attorney represented both Lira and Killoton in their applications for alien labor certification, the CO noted that Kim had remained in charge of Killoton while he was working for Lira in the job authorized pursuant to Lira's application for alien labor certification in his behalf. Kim was presumably holding a full-time labor certification position with Lira when Killoton submitted the instant application for alien labor certification, said the CO, noting that Kim was able at the same time to establish a prospective new position in Killoton for which he would hire and supervise the Alien, who was the president of Eden. In answer to the request for documentation to show that the Alien's wife could take over the management of Eden dba Shark, the Alien only said that he believed she would be able to manage Shark on the basis of her experience as an assistant sales manager. The CO continued,

> But the petitioner has established that he continued to run his own company during the brief period that he apparently also worked in another labor certification position. There is no convincing documentation , on the other hand, that the instant alien beneficiary would truly cease to run his own company, which pays him about [$6,000] per month, in order to accept $2,250 per month as a purchasing agent for this petitioning employer.
>
> The alien has a going concern which is his own family business. At the same time, the labor certification position being offered to him is newly created and was offered to him by the president who was working elsewhere in another full-time labor certification job at the time that the offer was made. The mere fact that both employer and alien indicate that they are not related and do not have common ownership between their companies is not sufficient to persuade that the instant job would be created for anyone other than the alien. We are not persuaded that the Employer truly expects the alien to stop running his own company, and we are not persuaded that the job as offered is other than a labor certification position being created for the alien beneficiary.

The CO then denied certification for the reasons stated. AF 09-10.

Appeal. On August 21, 1997, the Employer appealed. The Employer disagreed with the conclusions of law and fact stated by the CO and argued that the finding was unsupported by reason because its premise was that the Alien's wife would not be capable of running the family business. Employer further argued that the CO's observations regarding Kim's holding two jobs at the same time were not relevant to the Employer's application.

Discussion

Issue. The premise underlying the Application and the CO's analysis is that the Employer's application is based on the creation of a new position in Killoton's women's apparel manufacturing business, for which it proposed to hire the Alien. The CO's denial of the application for alien labor certification was based on the finding that the Employer failed to establish the *bona fides* of the job opportunity it purported to offer.

Burden of proof. The Employer must sustain the burden of showing that a *bona fide* job opportunity existed that was open to U. S. workers. **Amger Corp.**, 87 INA 545 (Oct. 15, 1987)(*en banc*). The allocation of this burden of proof arises from the circumstance that labor certification is an exception to the general operation of the Act, in which Congress has provided favored treatment for a limited class of alien workers whose skills were needed in the U. S. labor market. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification.[5] **Gerata Systems America, Inc.**, 88 INA 344 (Dec. 16, 1988).[6]

Employer's evidence. In answering the request of the state employment security agency ("state agency") to identify the person who had in the past performed the functions that it described as Job Duties in this Application, Employer said its "production supervisor" used to perform those tasks.

> But due to the expansion of our company, we are in need of a full-time purchasing agent who can assume these duties on a full-time basis. As our company grows, our production supervisor has had to devote more of her time to the many other tasks associated with being production supervisor.

AF 91. The Employer's other evidence was less than credible because it was not supported by a definite, detailed description of the proposed business expansion that the Employer cited to justify its expenditure of more than six thousand dollars per month to pay a new employee to carry out the functions it theretofore had assigned as an auxiliary duty to be performed in a small part of his predecessor's working day. **Rick Trading Corp.**, 92 INA 375 (Aug. 26, 1993); **BMVW, Inc.**, 91 INA 355 (May 14, 1993); **Azumano Travel Service, Inc.**, 90 INA 215 (Sep. 4, 1991).

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[5] "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

[6] Moreover, the Panel is required to construe this exception strictly, and to resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

This omission was made conspicuous by the CO's suggestion that Killoton's hiring an expensive new employee while its president was working for Lira, another firm in the same business, was incongruous. In order to increase the family income, Kim took the job with Lira in September 1994, leaving his wife to operate Killoton until December 1995, when they decided it would be better if he quit Lira and returned to running Killoton on a full time basis. AF 13. Similarly, the Alien explained his availability to take the newly created job as purchasing agent for Killoton because he was not needed at Shark, "and it will add a second income for my family." AF 21. The CO's denial of certification was supported by Kim's initial need to take the job with Lira and to leave his wife in charge of the business in order to have added income from that second job, since this implied that the Killoton did not have the funds to support the unnecessary hiring of additional managerial staff in conducting its business.

The Employer's account of Killoton's decision to expand indicates that time (1) Kim subsequently resumed full-time his regular duties as president of Killoton and (2) Killoton's production supervisor became unavailable to perform the job duties of Purchasing Agent in addition to her other work as a result of the business expansion the Employer mentioned in its reply to the state agency. Consequently, when the CO weighed the implications of the reduction in Kim's income on his return to Killoton from Lira together with (1) Employer's reassignment of its production supervisor to other duties due to the business expansion and (2) the Employer's proposed addition of a six thousand dollar a month purchasing agent to the Killoton payroll, the CO could reasonably question the logic, if not the *bona fides*, of Employer's decision to establish this new position. In the absence of a definite, detailed description of the proposed business expansion, the Employer's explanations for (1) Kim's taking a job with Lira and later quitting, (2) for the Alien's decision to take the Job Offered and to leave his existing business, (3) Killoton's removal of its production supervisor from her part time duties as purchasing agent, and (4) Killoton's decision to replace the deletion of the part time work of the production supervisor with a new full time six thousand dollar a month employee were inconsistent with eachother and with the Employer's allegation that it was expanding its business. As such, the Employer's case was neither credible nor persuasive.

Alternative work experience. In view of the Alien's statement of qualifications, the Panel has examined the Appellate File under the holding in **Francis Kellogg, et als.**, 94 INA 465, 94 INA 544, 95 INA 068 (Feb. 2, 1998)(*en banc*). We held first in **Kellogg** that all of the job requirements listed on the ETA Form 750A, including the Employer's provisions for alternative work experience, must be read together as its minimum hiring criteria which, unless adequately documented as arising from business necessity, (1) shall be those normally required for the job in the United States, (2) shall be those defined for the job in the DOT, and (3) shall not include requirements for a language other than English. 20 CFR § 656.21(b)(2).

Although there are legitimate alternative job requirements, which can and should be permitted in the labor certification process, the work experience criteria must be substantially equivalent to eachother with respect to whether a job applicant can perform the duties of the position in a reasonable manner. Thus, where an employer's primary requirement is considered normal for the job in the United States and the alternative work experience requirement is substantially equivalent to that primary requirement in that a job applicant can perform in a reasonable manner the duties of the job offered, such an alternative requirement will be considered as normal when the record is considered under 20 CFR § 656.21(b)(2). In **Kellogg** we also held, however, that where the alien does not meet the primary job requirements, but is

only potentially qualified for the job because the employer has also listed such alternative job requirements, those alternative requirements are unlawfully tailored to the alien's qualifidations in violation of 20 CFR § 656.21(b)(2), unless the employer also has indicated that applicants with any suitable combination of education, training, or experience are acceptable.

Summary. The Panel finds that the evidence supports the CO's conclusion that the Employer failed to demonstrate the existence of a job for a purchasing agent, based on the history of this position, as it did not show that Killoton was expanding to the extent that Kim and its the production manager no longer could handle this work together with their other duties, and that the purchasing agent's duties required a full-time worker. 20 CFR § 656.20(c)(8). As the Alien did not meet the primary job requirements, but could only qualify for the job by meeting the Employer's alternative work experience, the Panel also finds that the alternative requirements were unlawfully tailored to the Alien's qualifidations in violation of 20 CFR § 656.21(b)(2), as the Emloyer failed to indicate that U. S. job applicants with any suitable combination of education, training, or experience were acceptable. For these reasons the Panel finds that the Employer did not sustain its burden of proving that a position of full-time employment in the operation of its business existed under 20 CFR § 656.3 on the date of application. .

As the NOF provided sufficient notice of the reasons for denial of certification, and that Employer was told how to cure the defects found in the application, the Panel concludes that the Employer failed to sustain its burden of proof, and that the evidence supports the CO's denial of labor certification under the Act and regulations.

Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification is affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: **1999 INA 049**
KILLOTON, INC., Employer,
YOON-SOO UEO, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner

Date: May 11, 1999